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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1011

BURTZ-DURHAM CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY, PETITIONERS,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. .....

BURTZ-DURHAM CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 5, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix B, pp. 10a) is not yet reported. The opinion of the same court denying petitioners' motion for rehearing (Appendix C, pp. 14a) is unreported. The findings of fact and conclusions of law of the United States District Court for the Northern District of Georgia, in support of the trial court's judgment against petitioners (Appendix D, pp. 15a), are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1967. A timely petition for rehearing was denied on November 14, 1967. The United States District Court for the Northern District of Georgia had original jurisdiction of the civil action commenced by the United States of America under 28 USCA 1345. The jurisdiction of this court is invoked under 28 USCA 1254 (1).

QUESTIONS PRESENTED

1. Whether the Armed Services Procurement Regulations establish rules of law governing the withdrawal of bids prior to award and the formation of contracts, which bind potential contractors bidding for government contracts with the United States Army Corps of Engineers; or
2. Whether the United States proceeds in procurement within the framework of established rules of law based on the common law of contracts and is bound by the same laws which govern ordinary citizens in the formation of contracts; and
3. Whether a bid for Government contract unsupported by consideration may be withdrawn prior to acceptance in accordance with applicable State and Federal law?

ARMED SERVICES PROCUREMENT REGULATIONS INVOLVED

The Armed Services Procurement Regulations which this case involved, Sections 2.405 through 2.406-1.2.3., Code Federal Regulations Title 32, Chapter 1, are printed in the Appendix A.

STATEMENT OF THE CASE

The suit was based upon a small business concern's bid for the construction of a bridge over the Chattahoochee River at the Walter F. George Reservoir between Georgia and Alabama, and the bid bond which accompanied the contractor's original bid.

The case was tried by the court without a jury with the basic facts and certain documentary evidence stipulated and the disputed matter centered in certain mistakes in the bid which caused withdrawal of the bid after the bids were opened, but before acceptance and prior to an award of contract. In response to the Government's invitation for bids, the contractor's proposal was set forth in writing February 24, 1962, on the Government's Standard Form No. 20, showing a total bid of $1,129,201.79. After the bids were opened, the Army Corps of Engineers changed the figure $1,129,201.79 appearing as the total of Page BF-7 of the bid, and entered $526,701.79, thus making Petitioner's the lowest in price by $53,493.71 of eight bids received, a "correction" justified in the opinion of the lower courts by an interpretation of the Invitation and the Bid.

The Government assumed authority to make the change on the grounds that an apparent clerical mistake was subject to correction by the contracting officer within the contemplation of the Invitation, the Bid Form, and the Regulations, but the contracting officer did not seek nor obtain verification from the contractor that the changed amount was the amount intended to be bid, and as a matter of fact the $526,701.79 to which the Government changed the original bid was not in fact what the bidder intended to bid because of $38,000.00 of other mistakes.

By the terms of the Invitation for Bids, the Government reserved the right to accept any bid deemed "most advantageous to the Government," and further provided that "the Government may, when in its interest, reject any and all bids or waive any informality in bids received." Attached to and incorporated by reference in the invitation was Standard Form 22, "Instructions to Bidders," prescribed by the Regulations Subparts 1-16.1, et seq., reciting regulatory provisions respecting "bid guarantee" and "modification or withdrawals of bids," and providing in substance that bids could not be withdrawn after opening. By the instructions set forth, if the successful bidder withdrew his bid within the time specified for acceptance, he would be liable for any difference by which the cost of procuring the work exceeded the amount of his bid. Without authority of the Regulations, the Invitation further set out a waiver of error formula applicable to "Mistakes in Bids" by which a bidder would be deemed to relinquish certain rights bearing on the formation of contract as the "waiver" provided.

When Petitioner learned that the reduced total attributed to it produced the lowest bid replying to the invitation, it did not verify the bid as reduced by the Government, but instead immediately informed the Government that the reduced amount did not correctly state the bid intended because of other mistakes. Then followed an appearance before Colonel Arthur T. Strickland of the Army Corps of Engineers about the mistakes, as a consequence of which the contracting officer refused to permit the bid's withdrawal because he did not consider that the evidence satisfied the standards required by the Regulations. Petitioner thereupon withdrew its bid by telegraph and letter prior to ac-

ceptance and prior to any award, and the present suit was commenced.

The trial court decided that the right of the bidder to withdraw its bid was controlled by the Armed Services Procurement Regulations, and that unless the bidder showed a mistake within the requirements of ASPR 2.406-3 by documentation in the original worksheets and other data used in preparing the bid, subcontractors' quotations, and other evidence to establish conclusively the existence of error, that withdrawal was not permissive where the mistake was not apparent on the face of the bid (Conclusion of Law No. 3, Appendix D; ASPR 2.406-3 (e)(1), Appendix A). The trial court held the view that the uncontradicted testimony of the contractor's witnesses was insufficient proof of error[1] and that the mistake required to be shown must appear on the face of the bid (Conclusion of Law No. 2, Appendix D). And finally, the District Court concluded that the administrative decision of the contracting officer of the Army Corps of Engineers settled the issue of the bidder's right to withdraw because of mistake as an administrative decision entitled

[1]The contractor offered three sworn witnesses: its president, Mr. L. M. Durham, its vice president, Mr. G. W. Burtz, and an employed engineer, Mr. Robert L. Sutton, each of whom testified positively that mistakes of $38,000.00 were made in figuring Item 500-G at $187,481.72 instead of $225,481.72, through the erroneous omission of $24,000.00 in the erection cost of the pre-stressed concrete girders and structural steel work, and of $14,000.00 engineering, profit and contingency expense attributable to the superstructure phase of the bridge construction. The contractor's work paper cataloguing the cost items of superstructure shows that the entry of the $24,000.00 for the steel girder erection was written down in ink after the remaining column had been added to the total of $187,481.72. Notation of the correct addition was entered on this work paper later during the process of reconstructing the manner in which the mistake had occurred. Thus, Petitioners' Documentary Exhibits 2, 3, 4, 5 and 6 corroborate the positive and direct oral testimony of Messrs. Burtz, Durham and Sutton, and no evidence of any sort was brought forward by the Government which contradicted it. The court's finding in this regard can have no explanation other than that the trial court sought an absolute documentation in accordance with ASPR Section 2.406-3 (e) (1) "which conclusively establishes the existence of error, the manner in which it occurred, and the bid actually intended." (Appendix A)

to finality, because the contractor had not exhausted administrative remedies (Conclusions of Law No. 3 and No. 6, Appendix D).

On appeal, the Court of Appeals for the Fifth Circuit affirmed. The court did not deal expressly with the question of whether in the formation of Government contracts the United States is controlled by the same laws as govern individuals. By inarticulate major premise, the appeals court presumed that this was not true, and assumed that the Armed Services Procurement Regulations fixed the rights of the parties as to the formation of contract. The court presumed that since under general legislation governmental agencies are authorized to promulgate regulations in federal procurement, that the regulations govern all phases of the procurement process, from the solicitation of bids to the making of contracts, through the administration and performance of the contracts to completion or termination, and that potential contractors with the Federal Government are bound by the law of the regulations.

The court reasoned that it was unnecessary "for the court to resolve the many interesting and somewhat difficult questions of the law applicable to the formation of government contracts, especially the extent to which restrictions may be placed about the absolute right of withdrawal of a bid before acceptance," (Appendix B, Court of Appeals Opinion) — principles of law actually used by the trial court in making the finding, because of the trial court's finding of fact under the very criteria it deemed unnecessary to consider that the bidder "failed to prove by either preponderance of the evidence or by clear and convincing proof, as required by the regulations, that a mistake had been made (Appendix B, pp. 10a)."

REASONS FOR GRANTING THE WRIT

1.

ORDINARY RULES OF CONTRACT LAW APPLY TO THE FORMATION OF GOVERNMENT CONTRACT

The decision below should be reviewed because it erroneously establishes the proposition that the United States proceeds in federal procurement under special rules of contract law governing the formation of its contracts different from the rules of law which bind other people. The decision constitutes a holding that federal regulations (ASPR Section 2.406-3, respecting withdrawal of bids) are a "code of laws" to be enforced by the federal judiciary, which supersedes state and federal law to the contrary. This is a departure from the principle of **Priebe and Sons, Inc. v. U. S.**, 332 U.S. 407, 68 SCt. 123, 92 L.Ed. 32, that the character of the government in the field of procurement is as any other party to a contract, and is governed by the same laws that govern other parties.

If the Fifth Circuit Court of Appeals had adhered to its own precedent in the field of public and private contract law, it would be inescapable that petitioner's withdrawal of its bid prior to acceptance prevented the formation of any contract. See **Peerless Casualty Company v. Housing Authority of the City of Hazlehurst,** 228 F. 2d 376 (5th Circuit, 1955).

If the decision of the court below is permitted to stand, it will mean that the Regulations require federal courts to fashion federal law inconsistent with state law in conformity with the Regulations to determine whether a contract was made with the United States

or not. Congress has never intended to permit the creation of such a sweeping body of federal substantive law, overruling the law made for all citizens in the respective states.

2.

THE ARMED SERVICES PROCUREMENT REGULATIONS DO NOT "JUDICIALIZE" CONTRACT PROCEDURES

The case presents an important question as to the scope and effect of federal procurement regulations in that it decides that federal courts ought to apply the Armed Services Procurement Regulations as rules of law to determine the formation of contracts. The appeals court would avoid a direct holding to this effect by blandly asserting that "essential to the defense by the contractor here is proof of the existence of the alleged mistake (Appendix B, pp. 10a)," presuming solution of the problem without comprehensive analysis. Such assumption merely begs the case, for how can the issue of "mistake" be resolved until the principles by which the factual circumstances will be judged are known? Mistake is a legal concept. What constitutes "mistake" in the use of the term must be based on a comprehension of the criteria by which a judgment is to be made arriving at the finding. Petitioner challenges the premise that it is unnecessary to consider the principles of law which define the criteria by which "mistake" is judged, because the finding arrived at was not "clearly erroneous." Such finding of fact may not be evaluated in vacuum, and until the principles of law are fixed by which the factual circumstances are to be judged, a court cannot say whether the finding was

erroneous or not. In effect, the court of appeals sanctioned the trial court in equating the provisions of Section 2.406-3 ASPR with rules of law controlling the formation of contracts, when in fact the function of the Regulations in the context of Section 2.406 is ministerial only. A fair and reasonable reading of Section 2.406 makes it clear that the regulations do not purport to express rules on the essential elements of contract law, and instead constitute internal agency directives as guidelines to subordinate agency officials. It is in this sense that the Regulations recognize the principle of **Perkins v. Lukens Steel Co.**, 310 U. S. 113, 84 L. Ed. 1108, SCt. 869, that the Regulations do not confer litigable rights to bidders on government contracts.

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies which create duties to the Government alone . . . It was not intended to be a bestowal of litigable rights upon those desiring of selling to the Government; it is a self-imposed restraint for violation of which the Government — but not private litigants, can complain . . . . ."

3.

ADMINISTRATIVE FINALITY MAY NOT BE GIVEN A CONTRACTING OFFICER'S DECISION UNDER THE REGULATIONS AS TO THE RIGHT OF A BIDDER TO WITHDRAW THE BID. BECAUSE OF MISTAKE

Finally, the court below approved the conclusion arrived at by the district court that the issue of the contractor's right to withdraw its bid, which in turn decided the basic question of the formation of contract, being under the Regulations a subject of administrative consideration before the Army Corps of Engineers, was administratively settled by the decision of the contracting officer; that the contracting officer's determination concluded the issue as an administrative judgment binding on the federal courts under the doctrine of primary jurisdiction and "exhaustion of remedy (Conclusions of Law Nos. 3 and 6, Appendix D, pp. 15a)." The appellate court's upholding of the district court's conclusion in this respect is squarely in the face of this court's decision in **U. S. v. Utah Construction and Mining Company,** 86 SCt. 1545 (1966), 384 U. S. 394, 16 L. Ed. 2d 642, that the administrative law attributes of the Regulations are limited to what is "contractually bargained for" under the "disputes clause" of a formed contract. The issue of contract formation was not a proper subject for administrative determination within the meaning of administrative law, and the doctrine of "exhaustion of remedy" accepted by the lower courts as controlling had no valid relevance to trial of the issue.

Certiorari should be granted in this case for the reason that this court has never rendered a decision con-

cluding whether or not the validity of all government procurement contracts will be determined by statutory or common law, or by regulations adopted by various federal agencies. The question is whether federal courts are bound to apply the criteria enacted by the procurement agencies in the form of regulations with respect to judicial matters within the jurisdiction of the federal courts.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ARMED SERVICES PROCUREMENT REGULATIONS CODE FEDERAL REGULATIONS

TITLE 32—CHAPTER 1

Sections 2.405—2.406-1.2.3.

§ 2.405 Minor informalities or irregularities in bids.

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, and no effect on quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders. The contracting officer shall either give to the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid, or, waive any such deficiency where it is to the advantage of the Government. Examples of minor informalities or irregularities include:

(a) Failure of the bidder to return the number of copies of signed bids required by the invitation;

(b) Failure to furnish required information concerning the number of the bidders' employees;

(c) Failure of a bidder to sign his bid, but only if:

(1) The firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and

submits evidence of such authorization and the bid carries such a signature, or

(2) The unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid document such as the submission of a bid guarantee with bid, or a letter signed by the bidder with the bid referring to and clearly identifying the bid itself; and

(d) Failure of a bidder to acknowledge receipt of an amendment to an invitation for bids but only if:

(1) The bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the invitation for bid and the bidder submitted a bid thereon, or

(2) The amendment clearly would have no effect or merely a trivial or negligible effect on price, and no effect on quality, quantity, delivery, or the relative standing of bidders, such as an amendment correcting a typographical mistake in the name of the Government purchasing activity; and

(e) Failure to furnish an affidavit concerning affiliates, if required pursuant to § 2.201 (a) (23).

[25 F.R. 14118, Dec. 31, 1960, as amended at 26 F.R. 2603, Mar. 28, 1961; 28 F.R. 12552, Nov. 23, 1961]

§ 2.406 Mistakes in bids.

§ 2.406—1 General.

After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mis-

takes, and in cases where the contracting officer has reason to believe that a mistake may have been made, he shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in the manner set forth below. Such actions shall be taken prior to award.

§ 2.406—2 Apparent clerical mistakes.

Any clerical mistake apparent on the face of a bid may be corrected by the contracting officer prior to award, if the contracting officer has first obtained from the bidder* verification of the bid actually intended. Examples of such apparent mistakes are: obvious error in placing decimal point; obvious discount errors (for example—1 percent 10 days, 2 percent 20 days, 5 percent 30 days); obvious reversal of the price f.o.b. destination and the price f.o.b. factory; obvious error in designation of unit. Correction shall be reflected in the award document.

§ 2.406—3 Other mistakes.

(a) The Departments are authorized to make the following administrative determinations in connection with mistakes in bids, other than apparent clerical mistakes, alleged after opening of bids and prior to award.

(1) Where the bidder requests permission to withdraw a bid and clear and convincing evidence establishes the existence of a mistake, a determination permitting the bidder to withdraw his bid may be made.

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*Revised July 21, 1966, Federal Register Vol. 31, No. 140, Pg. 9853, to add: "written or telegraphic verification of the bid actually intended."

(2) However, if the evidence is clear and convincing both as to the existence of the mistake and as to the bid actually intended, and if the bid, both as uncorrected and as corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal.

(3) Where the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, in the event such correction would result in displacing one or more lower bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

(4) Where the evidence is not clear and convincing that the bid as submitted was not the bid intended, a determination may be made requiring that the bid be considered for award in the form submitted.

(b) Authority for making the determinations described in paragraph (a) (1) of this section may be delegated, without power of redelegation, to any purchasing activity having legal counsel available. Authority for making the determinations described in paragraph (a) (2), (3) and (4) of this section may be delegated, without power of redelegation as set forth below:

(1) Department of the Army: To the Chief, Contracts Division, Directorate of Procurement, Office of the Assistant Secretary of the Army (Installations and Logistics); General Counsel of the U. S. Army Material Command; General Counsel of the Office of the Chief of Engineers.

(2) Department of the Navy: To the Director, Contracts Division, Bureau of Yards and Docks; the Assistant Chief for Purchasing, Bureau of Supplies and Accounts.

(3) Department of the Air Force: To the Staff Judge Advocate, Headquarters, Air Force Logistics Command.

(4) Defense Supply Agency: The Counsel.

(c) Each proposed determination shall have the concurrence of legal counsel within the Department concerned prior to issuance.

(d) To support correction of an allegedly erroneous bid subsequent to opening, the records submitted by the contracting officer in accordance with Departmental procedures shall contain the best available evidence conclusively establishing not only the existence of the error, but its nature, how it occurred, and what the bidder actually intended to bid. A mere statement that the administrative officials themselves are satisfied that an error was made is insufficient.

(e) In order to assure compliance with paragraph (d) of this section, suspected or alleged mistakes in bids will be processed as follows:

(1) In the case of any suspected mistake in bid, the contracting officer will immediately contact the bidder in question calling attention to the suspected mistake, and request verification of his bid. The action taken to verify bids must be sufficient to either reasonably assure the contracting officer that the bid as confirmed is without error or elicit the anticipated allegation of a mistake by the bidder. To insure that the bidder concerned will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised, as is appropriate, of (i) the fact that his bid is so much lower than the other bid or bids as to indicate a possibility of error, (ii) important or unusual characteristics of the specifications, (iii) changes in requirements from previous purchases of a similar item, or (iv) such other data proper for disclosure to the bidder as will give him notice of the suspected mistake. If the bid is verified, the contracting officer will consider the bid as originally submitted. If the time for acceptance of bids is likely to expire before a decision can be made, the contracting officer shall request all bidders whose bids may become eligible for award to extend the time for acceptance of their bids. If the bidder whose bid is believed erroneous does not grant such extension of time, the bid shall be considered as originally submitted. If a bidder alleges a mistake, the contracting officer will advise the bidder to make a written request indicating his desire to withdraw or modify the bid. The request must be supported by statements (sworn statements if possible) concerning the alleged mistake and shall include all pertinent evidence such as bidder's file copy of the bid, the original worksheets and other data used in preparing the bid, subcontractors' quotations, if any, published price lists,

and any other evidence which conclusively establishes the existence of the error, the manner in which it occurred, and the bid actually intended.

(2) Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless the amount of the bid is so far out of line with the amounts of other bids received or with the amount estimated by the agency or determined by the contracting officer to be reasonable, or there are other indications of error so clear, as reasonably to justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders. The attempts made to obtain the information required and the action taken with respect to the bid shall be fully documented.

(3) Where the bidder furnishes evidence in support of an alleged mistake, the contracting officer shall refer the case to the appropriate authority, together with the following data:

(i) A signed copy of the bid involved;

(ii) A copy of the invitation for bids and any specifications or drawings relevant to the alleged mistake;

(iii) An abstract or record of the bids received;

(iv) A written request by the bidder to withdraw, or modify the bid, together with the bidder's written statement and supporting evidence (such as work sheets, or other data used in preparing the bid) of

the existence of the mistake and manner in which it occurred, and supporting evidence of the bid actually intended;

(v) A written statement by the contracting officer setting forth (a) a description of the supplies or services involved, (b) the expiration date of the bid in question and of the other bids submitted, (c) specific information as to how and when the mistake was alleged, (d) a summary of the evidence submitted by the bidder, (e) in the event only one bid was received, a quotation of the most recent contract price for the supplies involved, or, in the absence of a recent contract for the item, the contracting officer's estimate of a fair price for the item, and (f) any additional evidence considered pertinent. The statement shall recommend that either the bid be considered for award in the form submitted, or the bidder be authorized to withdraw the bid, or the bidder be authorized to modify the bid.

When time is of the essence because of the expiration of bids or otherwise, the contracting officer may refer the case by telegraph or telephone to the designated authority. Ordinarily, contracting officers will not refer mistake in bid cases by telegraph or telephone to the designated authority, when the determinations set forth in paragraph (a) (2) and (3) of this section are applicable, since actual examination is generally necessary to determine whether the evidence presented is clear and convincing.

(f) Nothing contained in this section prevents a Department from submitting doubtful cases to the Comptroller General for advance decision.

(g) A signed copy of the administrative determination authorizing withdrawal or modification of the bid made in accordance with paragraph (a) of this section shall accompany the General Accounting Office copy of the contract awarded. Each Department shall maintain records of all administrative determinations made in accordance with paragraph (a) of this section, together with a complete statement of the facts involved and the action taken in each case. Copies of all administrative determinations will be included in the contract file.

[25 F.R. 14118, Dec. 31, 1960, as amended at 27 F.R. 3447, Apr. 11, 1962; 28 F.R. 4882, May 16, 1963; 29 F.R. 6915, May 27, 1964]

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24551

BURTZ-DURHAM CONSTRUCTION CO., INC. and CONTINENTAL CASUALTY COMPANY,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(October 5, 1967.)

Before TUTTLE, BELL and SIMPSON, Circuit Judges.

PER CURIAM: This appeal concerns the alleged omission by a bidder on a government contract of items totalling $38,000 from a bid which appellant sought to withdraw before acceptance.

In response to an invitation for bids to build a bridge, appellant submitted to the U. S. Army Corps of Engineers a bid of $1,129,201.79, accompanied by a bid bond of 20%, executed by Continental Casualty Company. By the terms of the bid, the government

reserved the right to reject any and all bids and further reserved the right to accept any bid which was most advantageous to the government. Attached to and incorporated by reference in the invitation was standard form 22 containing instructions to bidders and clearly prohibiting withdrawal of bids after the opening. If the successful bidder withdrew the bid, he would be liable for any differences by which the cost of procuring the work exceeded his bid; late bids and modifications and withdrawals received after the opening would not be considered unless due to a delay in the mails or mishandling by the government. The bid was submitted on the express condition that unit prices were to govern in case of a discrepancy. Further provisions set up a waiver of error formula which applied except as to clerical errors.

Armed Services Procurement Regulations provide an administrative remedy which may lead to a sanctioned withdrawal or adjustment if the prescribed procedures are followed. The gist of these regulations is that bids shall be checked on opening by the government for apparent mistakes or anything that would put the government on inquiry. A clerical mistake apparent on the face of the bid may be corrected by the government prior to award if verification of the corrected bid is then obtained from bidder. Where a bidder alleges a mistake other than apparent clerical mistake after opening and prior to the award, clear and convincing evidence must establish the existence of the mistake and the bidder must support his request by affidavits, original worksheets, and any other evidence which conclusively establishes the existence of the error, the amount of the error and the bid actually intended, and where the bidder fails

to furnish such evidence, the contracting officer shall consider the bid as submitted, unless it is so far out of line with other bids or government estimates as reasonably to justify the conclusion that acceptance would be unfair to the bidder or other bona fide bidders.

The bid submitted by appellants showed a total of $1,129,201.79, which was erroneous because of a clerical error which listed a figure of $670,100 instead of $67,010. The government corrected the bid according to the controlling unit prices at a figure of $526,-701.79.

The corrected bid was the lowest. Before award, appellants learned of the corrected bid and notified the government of an alleged omission of items totalling $38,000. An appearance was made before the contracting officer, but explanation for the omission was unsatisfactory to him. Appellants presented no affidavits or original worksheets and left no evidence with the contracting officer. The appellants then later telegraphed withdrawal of their bid and the contracting officer replied that he was without authority to permit withdrawal and that evidence according to the regulations had not been submitted. Apparently at a later date, an affidavit was submitted to the contracting officer, which he found not to amount to clear and convincing proof of error. The contract was awarded to the appellants but they refused to execute the documents. The contract was then awarded to the Newton Company for $576,910.50, and the government brought an action for the difference.

We conclude that it is not necessary for the court to resolve the many interesting and somewhat difficult questions of the law applicable to the formation of government contracts, especially the extent to which restrictions may be placed about the absolute right of withdrawal of a bid before acceptance. See generally **Moffett, Hodgkins and Clarke Co. v. Rochester,** 178 U.S. 373 (1900); **Scott v. U.S.,** 44 Ct. of Cls. 524 (1909), and see Pasley, Formation of Government Contracts-Application of Common Law Principles—A Reply, 40 Cornell L.Q. 518 (1955). Essential to the defense by the contractor here is proof of the existence of the alleged mistake. The trial court found that appellants failed to prove by either preponderance of the evidence or by clear and convincing proof, as required in the regulations that a mistake had been made. Upon carefully reading the record dealing with the proof as to the existence of the mistake, we conclude that the trial court's finding is not clearly erroneous. It is, therefore, of course, unnecessary for the court to go further to a consideration of the principles of law that would be applicable were the finding of fact by the trial court to the contrary.

The judgment is AFFIRMED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24551

BURTZ-DURHAM CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING EN BANC

(November 14, 1967)

Before TUTTLE, BELL and SIMPSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Filed Dec. 2, 1966.

(Title Omitted.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The United States, as plaintiff in this case, seeks to recover damages and interest from the defendants Burtz-Durham Construction Company, Inc., and Continental Casualty Company. Plaintiff asserts damages in the sum of $50,208.71 by reason of breach of contract on the part of defendant Burtz-Durham Construction Company, and the failure to pay plaintiff in accordance with the terms of the bid bond by defendant Continental Casualty Company. Plaintiff also contends for interest on $50,208.71 at 6 percent from the date of the breach.

The case came on to be tried before the Court without a jury on October 11, 1966, and, after hearing the evidence and receiving the briefs and written arguments of counsel, the case is now properly before the Court for determination.

Giving Consideration to the evidence in the case, the Court makes the following

Findings of Fact.

1. On February 20, 1962, defendant Burtz-Durham Construction Company, Inc. (hereinafter referred to as Burtz-Durham) submitted a bid for the construction of a road and bridge over the Chattahoochee River at the Walter F. George Reservoir in response to an invitation for bids by the United States Corps of Engineers. This bid was accompanied by a bid bond executed by defendant Continental Casualty Company.

2. Paragraph 7 of the invitation reads in part:

7. Mistakes in Bids. The bidder hereby waives that portion of any alleged mistake or mistakes in his bid which falls within the following amounts:

. . . .

If a bid is $500,000 or more, and less than $1,000,000, $22,500 plus 3% of the bid over $500,000;

. . . .

3. The instructions to bidders attached to the invitation, known as Standard Form 22, 26 Fed. Reg. 1048 (Feb. 3, 1961) (now 41 C.F.R. § 1-16.901-22), provides in part:

4. Bid Guarantee. . . .

If the successful bidder withdraws his bid within the period specified therein for acceptance (sixty days if no period is specified) . . . he shall be liable for any difference by which the cost of procuring the

work exceeds the amount of his bid, and the bid guarantee shall be available toward offsetting such difference.

7. Late Bids and Modifications or Withdrawals. Bids and modifications or withdrawals thereof received . . . after the exact time set for opening of bids will not be considered unless received before award and . . . (b) it is determined by the Government that late receipt was due solely to either (1) delay in the mails . . . for which the bidder was not responsible or (2) mishandling by the Government after receipt at the Government installation . . .

8. Withdrawal of Bids. Bids may be withdrawn by written or telegraphic request received from bidders prior to the time set for opening of bids.

4. Page BF-1 of the bid states that Burtz-Durham's obligation was to be in compliance with the invitation for bids.

5. The bid bond executed by defendant Continental Casualty Company provided for the penal sum of 20 percent of the total amount of the bid and states that "if the principal shall not withdraw said bid . . . and shall . . . execute such further contractual documents . . . or in the event of the withdrawal of said bid . . . if the principal shall pay the Government the difference between the amount specified in said bid and the amount for which the Government may procure the required work . . . then the above obligation shall be void . . ."

6. After the correction of certain arithmetical errors on the face of the bid, which are not material

here, Burtz-Durham's bid of $526,701.79 was the lowest of those submitted. The next lowest bid was that of Henry Newton Company of Decatur, Georgia, for $576,910.50.

7. As required by the bid form, each bid was broken down into items comprising the various stages of construction. Neither the Burtz-Durham total bid nor the various items of its bid were out of line with the totals and the corresponding items of the plaintiff's estimate of the cost of the project, or with the totals and corresponding items of the other bidders, and the plaintiff neither knew nor had reason to know that Burtz-Durham had made a mistake in the bid as a whole or any of the items of the bid. Burtz-Durham's total bid was 8 percent above the Government estimate and 9 percent below the next lowest bid. The alleged erroneous item 500-G (Superstructure) was listed at $187,481.72, which was $1,481.72 above the bid of Goodwyn Williamson Company. The evidence indicated that such a bid was not out of the normal range of bids which would cause the Government to have reason to know of the mistake from the face of the bid.

8. On February 23, 1962, Burtz-Durham notified the plaintiff by telephone that a mistake had been made in its bid. On February 26th, officers of Burtz-Durham attempted to explain the mistake to the plaintiff, but submitted no affidavits or original data or worksheets of any kind, and left no evidence at all for plaintiff's consideration.

9. On February 27th, Burtz-Durham sent a telegram to the plaintiff stating that it was withdrawing

its bid "for the sum of $526,701.00 [sic]," and that it would soon furnish evidence of the errors which were the reason for this withdrawal.

10. On February 27th, the plaintiff sent a telegram in response, stating: "Complete evidence, including the original [sic] of work papers, all documents and data, along with affidavits of persons committing error, showing how made, who made it, and what was intended, should reach this office by noon, 1 Mar., to be forwarded to higher authority for consideration and resolution of alleged error. Your telegram cannot be, and is not being treated as a withdrawal or cancellation of the bid bond. . ." And: "This office without authority to permit withdrawal, cancellation, or voidance of your bid."

11. The plaintiff subsequently issued a notice of award and submitted contract documents to Burtz-Durham; Burtz-Durham refused to execute these documents.

12. By telegram and letter of March 29, 1962, plaintiff terminated the contract for default. Thereafter, plaintiff awarded the contract for this project to Henry Newton Company for $576,910.50, which was $50,208.71 in excess of Burtz-Durham's bid. The plaintiff now brings this action for the excess amount.

13. Burtz-Durham failed to prove either by a preponderance of the evidence or by clear and convincing evidence its alleged errors of $24,000 in the omission from the superstructure item of the cost of erecting steel girders, $10,000 in the omission from that item of profit, overhead, or "contingencies", and

$4,000 in the omission from that item of engineering costs.

Conclusions of Law.

1. This Court has jurisdiction under 28 U.S.C., Section 1345.

2. Burtz-Durham Construction Company, Inc., made a firm bid, accompanied by a bid bond; and, under federal law, a bidder on a government contract may withdraw his bid only when he has made an honest mistake and the Government knew or had reason to know of the mistake from the face of the bid. United States v. Lipman, 122 F. Supp. 284, 287.

3. A withdrawal by a bidder is ineffective where the bidder has failed to exhaust his administrative remedies, in accordance with the regulations governing government procurement, 25 Fed. Reg. 14120 (Dec. 31, 1960) (now 32 C.F.R. § 2.406-3), by submitting clear and convincing evidence of his alleged mistake in the form of affidavits, original worksheets and other data used in preparing the bid, subcontractors' quotations, published price lists and any other evidence which supports his allegation.

4. The burden was on Burtz-Durham Construction Company to prove its alleged mistake by clear and convincing evidence. Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373, 386.

5. Burtz-Durham Construction Company waived $23,301.05 of any mistake it might have made; only the excess of any mistake over this figure may be

considered by the Court, and Burtz-Durham's error, if any, was less than this amount.

6. The withdrawal by Burtz-Durham Construction Company was ineffective because the plaintiff neither knew nor had reason to know of any mistake; for the additional reason that Burtz-Durham did not exhaust its administrative remedies; and for the further reason that Burtz-Durham failed to prove by clear and convincing evidence a mistake of any nature, and especially one exceeding $23,301.05, the amount which was waived.

7. Burtz-Durham Construction Company's withdrawal was ineffective, and a binding contract was formed at the time of the award. A binding contract may not be rescinded for unilateral mistake.

8. Plaintiff United States of America is entitled to a judgment against both defendants, jointly and severally, in the amount of $50,208.71, plus interest at 6 percent from the date of the breach, March 29, 1962, and costs.

A judgment in accordance with these Findings and Conclusions may be prepared and presented.

This the 1st day of December, 1966.

LEWIS R. MORGAN,
(Lewis R. Morgan),
United States District Judge.

JUDGMENT.

Filed Dec. 14, 1966.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

UNITED STATES OF AMERICA
Plaintiff,

vs. Civil Action No. 9858

BURTZ-DURHAM CONSTRUCTION COMPANY, INC., a Corporation, and CONTINENTAL CASUALTY COMPANY, a Corporation, Defendants.

This action came on for trial before the Court without a jury on October 11, 1966, at Atlanta, Georgia, plaintiff appearing by its attorneys Beverly B. Bates and Stephen R. Felson, and defendants appearing by their attorneys Alex McLennan and Scott Hogg, and testimony having been offered and briefs filed by all parties, and the Court having filed its findings of fact and conclusions of law, and its opinion herein, it is hereby

Ordered, Adjudged and Decreed that plaintiff have judgment against defendants, jointly and severally, in the sum of $50,208.71, with interest at six per cent from March 29, 1962; the balance due, including principal plus interest as of December 5, 1966, is $63,975.52, of which $13,766.81 comprises the interest to that date, with a daily accrual rate of interest of $8.25348, and it is further

Ordered, Adjudged and Decreed that plaintiff recover from defendants its costs and disbursements in this action, to be hereinafter taxed by the Clerk of this Court, in the amount of $27.80.

Done and Ordered this 14th day of December, 1966.

LEWIS R. Morgan,
United States District Judge.

Presented by:

BEVERLY B. BATES,
Assistant U. S. Attorney.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1011

BURTZ-DURHAM CONSTRUCTION COMPANY, INC., AND CONTINENTAL CASUALTY COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a) is reported at 384 F. 2d 913. The opinion of the district court (Pet. App. 15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1967. A timely petition for rehearing was denied on November 14, 1967. The petition for a writ of certiorari was filed on January 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

290-367—68——

QUESTION PRESENTED

Whether the court below properly held that a bid on a government contract could not be withdrawn after the bids had been opened.

REGULATION INVOLVED

The instructions to bidders attached to the Instructions to Bidders, known as Standard Form 22, 26 Fed. Reg. 1048 (February 3, 1961) (now 41 C.F.R. (Jan. 1, 1964 rev.) 1–16.901–22), provides in part:

> 4. *Bid Guarantee* * * *.
>
> * * * * *
>
> If the successful bidder withdraws his bid within the period specified therein for acceptance (sixty days if no period is specified) * * * he shall be liable for any difference by which the cost of procuring the work exceeds the amount of his bid, and the bid guarantee shall be available toward offsetting such difference.
>
> * * * * *
>
> 7. *Late Bids and Modifications or Withdrawals.*
>
> Bids and modifications or withdrawals thereof received * * * after the exact time set for opening of bids will not be considered unless received before award and * * * (b) it is determined by the Government that late receipt was due solely to either (1) delay in the mails * * * for which the bidder was not responsible or (2) mishandling by the Government after receipt at the Government installation. * * *.
>
> 8. *Withdrawal of Bids.* Bids may be withdrawn by written or telegraphic request received from bidders prior to the time set for opening of bids.

STATEMENT

Petitioner Burtz-Durham Construction Company received an Invitation for Bids from the Army Corps of Engineers for the construction of a road and bridge. The invitation contained Instructions to Bidders, known as Standard Form 22, 26 Fed. Reg. 1048 (February 3, 1961),[1] which prohibited the withdrawal of a bid after the opening thereof except under conditions not relevant here. Burtz-Durham submitted a bid (along with a bid bond executed by petitioner Continental Casualty Company) in which the unit prices totaled $526,701.79.[2] This made Burtz-Durham the low bidder.

Burtz-Durham, after the opening of bids, claimed that its $526,000 bid contained a $38,000 error, and sought to withdraw the bid. Since satisfactory evidence of the alleged mistake was not presented to the contracting officer, he refused to allow withdrawal and awarded the contract to the company. Burtz-Durham refused to execute the contract documents; the government then re-let the contract and brought suit for the excess costs of $50,200 plus interest.

The district court, in awarding judgment to the government, found, *inter alia,* that the withdrawal could not be allowed since "Burtz-Durham failed to prove

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[1] Now found at 41 C.F.R. (Jan. 1, 1964 rev.) 1–16.901–22.

[2] The total as computed by Burtz-Durham was $1,129,201.79. This was the result of a clerical error which listed a figure of 670,100 in place of $67,010. In accordance with the provision in the bid that unit prices governed, the government corrected the erroneous total (Pet. App. 12a).

either by a preponderance of the evidence or by clear and convincing evidence" its alleged $38,000 error (Pet. App. 19a–20a). The court of appeals affirmed on the ground that the trial court's finding of "no mistake" was not clearly erroneous (Pet. App. 13a).

ARGUMENT

There is no merit to petitioners' contention that the government could not require that bids submitted on a government contract could not be withdrawn after the bids had been opened. It has long been recognized that such provisions with regard to government bids are entirely proper. See *Moffett, Hodgkins & Clarke Co.* v. *Rochester,* 178 U.S. 373; *W. A. Scott* v. *United States,* 44 Ct. Cls. 524. Nor was it improper for the trial court to hold that the determination of whether or not the bid submitted by Burtz-Durham was the result of a mistake should be governed by the standards set forth in the applicable government regulations. Cf. *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187; *Public Utilities Commission of California* v. *United States,* 355 U.S. 534. Finally, there is no reason for this Court to review the concurrent findings of the two courts below that there had been no mistake in this case. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635–636; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN L. WEISL, JR.,
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FEBRUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968